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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 965

CARL DEAN COTHREN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, CARL DEAN COTHREN prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix I) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in November 1967. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. Section 1254.

QUESTION PRESENTED

Where Federal Officer goes to door of dwelling house at nighttime and arrests petitioner while petitioner is inside of house and proceeds to search house and automobile near house without search warrant, is said search and seizure of contraband as a result thereof invalid as being repugnant to the Fourth Amendment to the Constitution of the United States and hence inadmissible as evidence in a criminal proceeding instituted against the petitioner for violation of the Internal Revenue laws relating to distilled spirits?

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

Amendment Four to the Constitution of the United States, Title 26 U.S.C. Section 5601 and 5604.

STATEMENT OF THE CASE

The petitioner was charged in a two-count bill of indictment charging him with possession of nontaxpaid distilled spirits and for removal and concealment of nontaxpaid distilled spirits. Prior to the case coming on for trial in the District Court for the Middle District of North Carolina the petitioner, in apt time, filed a written motion

to supress the evidence on the ground that the evidence of the government had been secured by means of an unlawful search of his premises and of his possessions in violation of the Fourth Amendment to the Constitution of the United States. The motion of the petitioner was denied by the District Court. The District Court adjudged the petitioner guilty as charged and entered the following judgment as to Count 1 of the Bill of Indictment: the petitioner was given a three year active prison sentence and as to Count 2 of the Bill of Indictment the imposition of the sentence was suspended and the petititioner placed on probation for a period of five (5) years from the time of the completion of the active sentence as to count one.

Notice of appeal to the Court of Appeals for the Fourth Circuit was filed by the petitioner in apt time and the petitioner was admitted to bail and is still admitted to bail.

The facts and circumstances of the procurement of the evidence by the United States through its Treasury Officers and upon which the United States relies on the conviction of the petitioner are as follows:

On the 26th day of October, 1966, Robert Schmidt and James A. King, Special Investigatiors of the Alcohol and Tobacco Tax Division of the Treasury Department, pursuant to reliable information that liquor was stored in the dwelling house of the petitioner, Carl Dean Cothren, set up an investigation and observation of said house. (See Tr. p. 9, 18). The observation began at 4:30 o'clock a.m. on the morning of the 26th day of October. The investigators stationed themselves approximately fifty-five (55) steps from the dwelling house. At 9:00 o'clock a.m. on this date Agent Schmidt left his observation post and went to

the basement door of this dwelling house and there detected the odor of non-taxpaid distilled spirits emitting from the basement of the dwelling house. (Tr. p. 14, 18, 19). At approximately 3:00 o'clock p.m. on the same date the investigators observed a pickup truck come to the basement door of the dwelling house. The petitioner and one William Russell Money were in the pickup truck. These two men loaded five-gallon Army-type cans from the basement of the house onto the pickup truck. The cans appeared to be empty. The petitioner was observed carrying a filter bag from the basement and put it into the cab of the pickup truck, after which the petitioner and William Russell Money left the premises. (Tr. p. 10-11).

At about 4:50 p.m. on the same day the two agents observed a Mercury automobile come to the premises in question and stop at the basement door of the dwelling house. The driver of the car opened the trunk of the Mercury automobile, went into the basement of the dwelling house and loaded the automobile with five-gallon Army-type cans from the basement. The agents could not identify the person on that occasion. This person left the premises at approximately 4:55 o'clock p.m. (Tr. p. 11, 12).

At approximately 11:00 o'clock p.m. on the same date a 1960 Oldsmobile in which the petitioner and one William Russell Money were occupying came to the premises in question and each of the men began carrying plastic one-gallon jugs from the basement and placing them in the trunk of the Oldsmobile. (Tr. p. 12, 13). The Oldsmobile was backed up near the entrance to the basement. After approximately ten or twelve jugs were placed in the trunk the petitioner got into the trunk and began placing the jugs on the shelf of the trunk next to the back seat of the

automobile. Petitioner then got out of the trunk and went back into the basement of the dwelling house and continued carrying more jugs to the trunk. The two investigators then approached the car and separated as they approached the car and house. As they came to the basement door no one was in the yard and the officers could see the petitioner and Money in the basement of the dwelling house. The officers waited at the basement door and after petitioner and Money began to exit from the basement the officers arrested the petitioner and Money while they were still in the basement of the dwelling house. After the arrest the officers searched the automobile and the dwelling house and there obtained through the search of the automobile and the dwelling house the incriminating evidence offered by the government in this case (Tr. p. 13-15).

The federal agents, during all of the time of the surveillance and observation of this dwelling house and during the time when the officer said he smelled the odor of nontaxpaid distilled spirits emitting from the dwelling house, at 9:00 o'clock a.m., and at the time that the officers at approximately 3:00 o'clock p.m. observed the petitioner and Money on the first occasion placing five-gallon Army-type cans into their motor vehicle and at 4:50 p.m. when they observed an unidentified person placing five-gallon Army-type cans into his automobile, there was available a United States Commissioner for the purpose of applying for a federal search warrant and the officers were in radio contact with the other officers in Wilkesboro where they were stationed. The officers made their surveillance and observation of this dwelling house and the activities in connection therewith by being upon the property of the petitioner.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an Indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code of 1954, Title 26 U.S.C., Sections 5601 and 5604. This was the basis for federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States and specifically in conflict with the following decisions:

1. Agnello v. United States, 269 U.S. 20 (1925);
2. McDonald v. United States, 335 U.S. 451 (1948);
3. Rabinowitz v. United States, 339 U.S. 56 (1950);
4. Johnson v. United States, 333 U.S. 10 (1947);
5. Chapman v. United States, 365 U.S. 610 (1960);
6. Jones v. United States, 357 U.S. 493 (1958).

In the case at bar the Court of Appeals held that the search of the petitioner's premises was incident to a lawful arrest of the petitioner, Carl Dean Cothren. It is conceded that the Officer had no warrant of arrest for the petitioner, nor a search warrant for the search of the petitioner's private premises or dwelling. It is further conceded that the purported arrest of the petitioner and the objected to search took place at nighttime.

In *Agnello* v. *United States,* supra, this Court held as a matter of law with respect to the interpretation of the Fourth Amendment to the Constitution of the United States.

> "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. . . . The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant."

The petitioner vigorously contends that the decision of the District Court and the Court of Appeals for the Fourth Circuit is directly in conflict with the *McDonald* case.

In *Rabinowitz* v. *United States,* supra, this court held that where the Federal Officer had a valid warrant for the arrest of the accused and lawfully arrested the accused within a one-room office building and simultaneously therewith searched the room itself validated the search as being incident to the lawful arrest of the accused. This case seems to be the most liberal case of this court validating searchers incident to a lawful arrest of the accused. However, in Rabinowitz a lawful arrest had taken place within the room searched.

In *Johnson* v. *United States,* supra, Federal Officers knocked upon the door of a hotel room where the officers

had recognized a distinct and strong odor of opium emitting therefrom. After hearing some scuffling from within the room and after some delay the accused opened the door and the officers immediately placed the defendant under arrest and searched the room, finding certain incriminating evidence against the accused. This court held that the defendant's motions to suppress the evidence under these facts should have been granted. The Court said:

> "At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain the defendant's contentation erroneously made, on the strength of Taylor v. United States, 286 U.S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the qdor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.".

It is quite evident that the officers in the case at bar had sufficient evidence to justify an impartial magistrate to issue a search warrant for the petitioner's premises on the basis of the holding in Johnson v. United States, supra, but this is not the case. No search warrant was obtained and the officers, as was done in the Johnson case, sought to justify the arrests by the search and at the same time to justify the search by the arrests. See also Chapman v.

United States, supra, where this court held that belief alone of incriminating evidence existing within a dwelling does not validate a search without a warrant.

In *Jones* v. *United States,* supra, this court held that the search of accused's premises without a search warrant at nighttime was invalid even though the officers were armed with a daytime search warrant, had found hot mash coming from within the house and had arrested two men in a truck leaving the house and the truck having thereon four hundred thirteen (413) gallons of liquor, and the arrest of the two men in the truck having occurred in near proximity to the house. The Court said:

> "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant Agnello v. United States, 269 U.S. 20, 33; Taylor v. United States, 286 U.S. 1, 6. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, e.g., Johnson v. United States, 333 U.S 10, 14; McDonald v. United States, 335 U.S. 451; cf. Giordenello v. United States, decided today, ante p. 480. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affiidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of

the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."

Therefore, your petitioner respectfully prays that the court grant the Petition for a Writ of Certiorari for the reasons as set forth hereinabove.

Respectfully submitted,
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All of North Wilkesboro, N. C.

PETITIONER'S APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11,452,

United States of America,
Appellee,

vs.

Carl Dean Cothren,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WILKESBORO. EDWIN M. STANLEY, CHIEF DISTRICT JUDGE.

(Argued October 5, 1967. Decided November 7, 1967.)

Before BOREMAN, CRAVEN and BUTZNER, Circuit Judges

John E. Hall and T. R. Bryan (McElwee & Hall on brief) for Appellant, and William H. Murdock, United States Attorney, (H. Marshall Simpson, Assistant United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

Carl Dean Cothren was tried before the court without a jury and convicted on both counts of a two-count indictment charging him with removing, concealing, and possessing non-taxpaid whiskey in violation of 26 U.S.C. §§ 5205(a)(2) 5601(a)(12) and 5604(a)(1). On appeal, he challenges the legality of his arrest and the subsequent search for and seizure of the contraband whiskey which provided the evidence on which his conviction was based. We affirm.

Pursuant to information received from one who previously had furnished information which proved reliable agents of the Alcohol and Tobacco Tax Division of the United States Treasury Department placed under surveillance a house which their informant advised them contained a cache of illegal whiskey. The house belonged to Cothren and his wife, but apparently was used by them only as a week-end retreat. On one occasion during their day-long observation, one of the agents, on moving closer to the house, detected the odor of illicit whiskey emanating from the basement. Later the same day, while still concealed in their hiding place, the agents observed the activities of several persons who drove up to the house, entered the basement and reappeared with cans which they loaded into their vehicles. Judging by the ease with which they were carried, the containers appeared to the agents to be empty. The agents also recognized Cothren as one of the parties removing the cans. Cothren, who was known to the agents personally, had a local reputation as a dealer in illicit whiskey.

Later, at about eleven o'clock that evening, accompanied by another party, Cothren returned to the house and again parked his automobile near the basement entrance. The two

men entered the basement and shortly thereafter reappeared carrying plastic jugs which they loaded into the trunk of the automobile. The agents watched them make several trips and observed that the jugs were of a variety quite generally used in the illicit whiskey business in that area.[1] Thus the information which they had received was corroborated. At that point the agents approached the house, saw the two men through the open basement door and placed them under arrest as they were about to leave the basement with another load of jugs in their arms. Again, the odor of illicit whiskey permeated the immediate area of the basement entrance. The agents then took possession of the jugs which had already been placed in the trunk of the automobile and proceeded to search the basement where they found the remainder of the cache of illicit whiskey of which their informant had advised them. The jugs in the automobile were likewise found to contain non-taxpaid whiskey.

The district court determined (1) that the arrest was lawful as the agents had probable cause to believe that a crime was being committed in their presence, and (2) that the search was lawful as incident to a valid arrest. We agree with these determinations.

Clearly the facts known to the officers as outlined above gave them probable cause within the meaning of the Fourth

---

[1] Originally, in the early morning darkness, the agents had positioned themselves several hundred yards from the rear of the house, but apparently daylight revealed that this distance was too great to permit an effective surveillance from that location. For that reason, they moved to a new location "only fifty-five steps" from the house. After backing his car up to the basement door, Cothren placed a large portable light in the trunk, doubtless to facilitate loading the jugs. This and the interior basement light which shone through the open basement door provided sufficient light by which the agents could easily watch Cothren's activities as he loaded the car.

Amendment[2] and reasonable grounds within the meaning of 26 U.S.C.A. § 7608(a)[3] to believe a felony was being committed in their presence.

Cothren challenges the legality of the search of his automobile and the "dwelling house" and the admissibility of evidence obtained as a result of the search and seizure. He contends that the arrest was invalidated by the failure of the officers to obtain a search warrant when facts sufficient to constitute probable cause for the issuance of a warrant were known to them early in the day of the arrest and they had ample opportunity to obtain a warrant. Cothren apparently thinks that the persuasiveness of this argument is enhanced by the fact that he was arrested while still inside the house and that a search was made of the basement room. We assume, although he does not expressly say so, that Cothren is basing his argument on the rule laid down in *Trupiano* v.

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[2] *See* United States v. Shew, 324 F.2d 733 (4 Cir. 1963) (per curiam); United States v. Young, 322 F.2d 443 (4 Cir. 1963); United States v. Williams, 227 F.2d 149 (4th Cir. 1955) (appeal by the Government dismissed on other grounds).

[3] Section 7608(a) provides:

"Enforcement of subtitle E and other laws pertaining to liquor, tobacco, and firearms.—Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—

"* * *

'(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

"(4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States."

See United States v. Price, 345 F.2d 256 (2 Cir. 1965); United States v. Boston, 330 F.2d 937 (2 Cir. 1964).

United States, 334 U.S. 699 (1948). However, this limitation on police activity was modified only two years later in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), and we think that the law today, at least on facts such as here presented, remains as stated in that case:

> "* * * It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that *Trupiano* v. *United States,* 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonablesness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. * * *" *Id.* at 65-66.

We do not attach any particular importance to the fact that Cothren was inside the open basement door at the moment he was placed under arrest, as found by the trial judge. Upon these facts there is no showing of invasion of the privacy of a home. The house was being used as a storage place for illicit whiskey. The agents could observe the interior of the basement from outside and they entered and searched the basement only after they had arrested Cothren. Cothren himself even denied knowledge of the ownership of the premises. We conclude that the searches were reasonable as incident to a valid arrest and the seizures were lawful under the circumstances.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 965

CARL DEAN COTHREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial to the court in the United States District Court for the Middle District of North Carolina, petitioner was convicted on two counts charging the unlawful possession and concealment of non-tax-paid liquor (26 U.S.C. 5604(a), 5601(a)(12)). On May 16, 1967, he was sentenced to three years' imprisonment on count 1 (concealment), and to five years' probation on count 2, to commence upon the expiration of the prison term. On November 7, 1967, the court of appeals affirmed (Pet. App. I). The petition for a writ of certiorari was filed on December 26, 1967, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion

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for further review of the question advanced, considered, and rejected in the courts below.

The evidence showed that at 4:30 a.m. on October 26, 1966, two agents of the Alcohol and Tobacco Tax Unit, acting on "reliable information" that whiskey was stored in an unoccupied dwelling, commenced surveillance of it (Tr. 9, 18),[1] by stationing themselves in the woods about fifty-five steps from the house (Tr. 10, 24–25). At about 9:00 a.m., one of the agents moved to an area nearer the house where he detected the odor of distilled spirits emanating from the basement (Tr. 14, 18–19). At 3:00 p.m., a truck backed to the basement door, and petitioner and one Money emerged from the truck and went to the basement. They then loaded seemingly empty five-gallon cans from the basement onto the truck and drove off (Tr. 10–11). This process was repeated about two hours later by a lone man in a Mercury whom the agents could not identify (Tr. 11–12). At about 11:00 p.m. another car arrived and backed to the basement door. Petitioner and Money stepped out and, after opening the trunk, carried several plastic one-gallon jugs apparently containing liquid from the basement to the car. The agents then approached the car. As they neared the basement door they saw petitioner and Money in the basement. They waited at the door and, when the two men reached the threshold, they placed them under arrest (Tr. 12–14, 17–18, 30–31, 38). The jugs in the car were found to contain non-taxpaid whiskey. The agents also conducted a search of the

[1] "Tr." refers to the transcript of proceedings at trial, lodged with the Clerk of this Court.

basement, where they found additional gallons of non-taxpaid liquor (Tr. 15, 32–33). No other portion of the house was searched (Tr. 22, 35).

DISCUSSION

Petitioner contends that the seizure of the whiskey in the basement was unlawful because the agents could have obtained a warrant.[2] He argues that agents ought to be required to obtain a warrant before being allowed to make a nighttime search of a private dwelling. The search here, however, was only of the basement of unoccupied premises which petitioner and his co-defendant were observed to be using as a storehouse for illegal liquor. The activities taking place before the surveilling agents clearly furnished probable cause to believe that a felony was being committed in their presence.[3] A warrant is not a prerequisite to an immediate arrest in such circumstances. Thus, the courts below correctly found that the search of the basement was justified as reasonably incident to a lawful arrest. See *United States* v. *Rabinowitz,* 339 U.S. 56; *United States* v. *Young,* 322 F. 2d 443 (C.A. 4). Nor is *Jones* v. *United States,* 357 U.S. 493, relied upon by petitioner, to the contrary. The court there held that

[2] The agents had no car but possessed a radio by which they could have reached other agents (Tr. 19–20, 35). A United States Commissioner was apparently available in a town some twenty miles away (Tr. 19).

[3] The fact, alluded to by petitioner (Pet. 5), that the agents conducted their surveillance from woods on petitioner's land did not violate any rights of petitioner. See *Hester* v. *United States,* 265 U.S. 57, 59; *United States* v. *Sorce,* 325 F. 2d 84 (C.A. 7), certiorari denied, 376 U.S. 931.

federal agents may not enter a private dwelling at night, without a warrant authorizing a nighttime search, on probable cause to believe that the house contained contraband materials.[4] The Court specifically distinguished and approved *Rabinowitz* as sustaining a warrantless search of premises where the search, as here, was predicated upon "an initial valid arrest". *Jones* v. *United States, supra,* 357 U.S. at 499.

Moreover, the evidence on the motion to suppress was heard along with the evidence in chief in this non-jury case. The district court noted that, as the trier of fact, it would find petitioner guilty without regard to the whiskey seized in the basement since the observations of the agent and the illicit whiskey found in the car were sufficient to establish guilt (Tr. 64).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Unlike the situation in this case, the house in *Jones* was occupied and the entry was forcible.

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